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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
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v.

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INSILCO BROADCASTING CORPORATION, *et al.*,
Petitioners

v.

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Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR INSILCO BROADCASTING CORPORATION, INSILCO BROADCASTING CORPORATION OF LOUISIANA, INC., INSILCO RADIO OF OKLAHOMA, INSILCO BROADCASTING CORPORATION OF OKLAHOMA, INC., McCLATCHY NEWSPAPERS, NEWHOUSE BROADCASTING CORPORATION, PALMER BROADCASTING COMPANY, PLOUGH BROADCASTING COMPANY, INC.

OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1a-56a) is reported at 610 F.2d 838. The Notice of Inquiry and Orders of the Federal Communications Commission (FCC App. 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals (FCC App. 57a-59a) was entered on June 29, 1979. The petitions for a writ of certiorari were filed on November 26, 1979, within the period for filing as extended by the Chief Justice. The petitions were granted on March 3, 1980. This Court's jurisdiction rests on 28 U.S.C. §§1254(a) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly concluded that the statutory goal of diverse programming was best served by a policy of not regulating radio station formats.

2. Whether a judicially-imposed policy requiring radio format regulation would violate the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of the Constitution of the United States and the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*, are set forth in the Appendix attached to this brief.

STATEMENT

The United States Court of Appeals for the District of Columbia Circuit ruled in a series of cases[1] that the Federal Communications Commission is obligated by statute to hold hearings on certain radio stations' format changes. The Commission, troubled by the difficulties of regulating formats, initiated notice and comment proceedings[2] culminating in a decision (the "*Policy Statement*")[3] to abstain from regulating radio formats. At issue is the court of appeals' ruling that the *Policy Statement* is "unavailing and of no force and effect." *WNCN Listeners Guild* v. *FCC*, 610 F.2d 838, 858 (D.C. Cir. 1979) (FCC. App. 1a, 40a).

Commercial and noncommercial radio stations compete for listeners by broadcasting music, informational programs and promotional materials in different combinations. The precise mix of program material, performers and technical presentation is unique to each station. Often these techniques are elaborate.

Most radio programmers adjust their selection of material to respond to the desires of the listening audience, and various groups within it, for particular music and information. The style of presentation is found through audience research to be an important component in listeners' choice of station. The radio marketplace is dynamic, responding to constantly changing listeners' preferences.

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[1] *Citizens Comm. to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve the Voice of Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970). *See also Hartford Communications Comm.* v. *FCC*, 467 F.2d 408 (D.C. Cir. 1972).

[2] *Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976) ("*Notice of Inquiry*") (FCC App. 60a).

[3] *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976) ("*Policy Statement*") (FCC App. 117a), *reconsid. denied*, 66 F.C.C.2d 78 (1977) (FCC App. 176a).

No precise definition of a radio "format" exists. Indeed, the elusiveness of the term "format" lies at the center of this case. Virtually any of the definitions favored by the Commission, the court of appeals or the litigants use highly subjective terms and widely different schemes for classifying various combinations of music and informational programming. These differences reflect the critical yet intensely personal preferences that exist among radio listeners, providing the constant challenge to innovate which motivates radio broadcasting in this country.[4]

For many years radio stations changed their programming at will, in the middle of a license term or in connection with a change of ownership, without interference from the Commission or courts. However, beginning in 1970, audience groups began to challenge licensees' format changes. In *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970), the Commission had decided that a hearing was unnecessary to determine the public interest consequences[5] of a proposed station sale that included plans

[4] *See Notice of Inquiry*, 57 F.C.C.2d at 594-95 (Commissioner Robinson, concurring) (FCC App. 93a-94a):

> [E]ven with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and citizens' groups (and, alas, appellate judges) call format. (Footnote omitted.)

[5] The standard of the "public interest, convenience, and necessity" is prescribed in Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a).

for changing format from classical music to "a 'blend of popular favorites, Broadway hits, musical standards, and light classics.'" 436 F.2d at 265. The court of appeals concluded that a hearing was necessary to resolve substantial factual issues, including the degree of public dissatisfaction with the proposed format change and the extent to which the Atlanta audience could rely on other sources for classical music.

The opinion discusses a 1969 statistical survey, taken by the proposed buyer, of format preferences in Atlanta. 640 people were asked which of two formats they preferred: a blend of show tunes, movie themes and standards with news; or opera, symphonic pieces, ballet and news. 73% preferred the first format, and 16% preferred the second. The court of appeals, however, interpreted this survey as demonstrating that 16% of the Atlanta audience preferred classical music to all other radio formats in the market,[6] even though the survey actually showed only that 16% of the population (as represented by the statistical sample) preferred the second format in the survey to the first format. The survey's methodology left open the question of whether the 16% might prefer other formats to the ones used in the study. It also did not try to measure intensity of preference. The court of appeals concluded that "it is surely in the public interest . . . for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." 436 F.2d at 269. However, the court did not examine any legislative history bearing on this interpretation of the public interest, nor did it probe the First Amendment ramifications of requiring a hearing on format matters.

In *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973), the court declared that the

[6] "We do not doubt that, at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right, for Atlanta as well as for other American cities . . ." 436 F.2d at 269.

Commission had improperly approved a contested transfer of a radio station in Sylvania, Ohio, near Toledo, because a hearing was not held. The station had unsuccessfully tried "country and western" and "golden [rock and roll] oldies" formats; shortly before the pending sale it installed a "progressive rock" format as an experiment. Although this latest change brought success, the buyer's somewhat vague proposal contemplated a change to "'generally middle of the road music [including] some contemporary, folk and jazz, similar to what [the] station is currently programming.'" *Id.* at 928 (footnote omitted). An *ad hoc* committee was formed to protest the change from "progressive rock." *Id.*

The *Progressive Rock* court, applying *Atlanta*, required a hearing, not on the station's financial condition as a result of using the "progressive rock" format, but on the issue of whether that format was "so economically unfeasible that an assignment encompassing a *format change* should be granted." *Id.* at 931 (emphasis in original). The court of appeals also declared that two "top forty [rock and roll]" stations in the Toledo area could *not* be deemed sufficient substitutes for the "progressive rock" station, because "[w]e deal here with format, not occasional duplication of selections." *Id.* at 932. The degree to which the two kinds of formats were fungible was to be resolved in a hearing. As before, the court of appeals presented no legislative history to support this view of the "public interest" standard, nor did it consider constitutional questions raised by restricting the licensee's selection of program material.

In *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*), the court of appeals consolidated its previous format decisions and established guidelines for the Commission's consideration of future format disputes. The case involved WEFM, a radio station in Chicago that lost money for several years using a classical music format. An agreement for sale was entered, with the new owner proposing a "contemporary" or "rock music" format. *Id.* at 254 n.4, 255.

Following protest by a citizens' group, the Commission concluded that a hearing was unnecessary and approved the transfer. The Commission reasoned that two other classical radio stations in Chicago provided substitute service. In a separate statement, six Commissioners declared that the public interest was best served by allowing format changes to be governed by competition in the marketplace rather than by regulation. *Id.* at 257-58.

The court of appeals overturned the Commission's decision. It relied on the *Atlanta* case, emphasizing the public interest in diversity of entertainment formats and in avoiding format changes that appeared detrimental to the public interest. The court, referring to its erroneous interpretation in *Atlanta* that 16% of the audience desired classical music above all else, emphasized the need in such cases to accommodate all major aspects of contemporary culture when technically and economically possible. *Id.* at 260-61. The court reversed the Commission's finding that the two other classical music stations in Chicago were reasonable substitutes for WEFM's classical format, observing that the record on this point was insufficient. One of the stations served a substantially smaller geographic area and the other station had a "fine arts" rather than a "classical music" format. The court held that "classical" and "fine arts" formats could not, without a hearing, be deemed reasonable substitutes. *Id.* at 262-65.

The court disputed the six Commissioners who stated that market determination of formats was preferable to regulation. The court said: "We think it *axiomatic* that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Id.* at 268 (emphasis supplied, footnote omitted). The court did not rely on legislative history nor did it assess the impact of this doctrine on First Amendment freedoms.

Following the decision in *WEFM* the Commission issued a notice of inquiry[7] to consider, for the first time, comprehensive legislative development of a radio format policy. The Commission was frankly concerned with the practical difficulties of implementing *WEFM* in a sensible way, and expected that even vigorous implementation would be of little value to the "public interest." The Commission was also gravely worried about constitutional difficulties that seemed to pervade the court of appeals' approach.

After comments and replies were received the Commission issued its *Policy Statement*,[8] announcing that it would no longer intervene to block format changes. The Commission concluded that putting radio programming in categories—whether relatively broad or narrow—was of little value. Comments, supported by a Commission staff study, showed that any format classification system was largely arbitrary, and that listeners perceived as much difference between stations within the same format category as they did between stations in different categories.[9] In the words of the study, "the variation in audience shares within given format types is nearly as large as the variation between different types. Again, this indicates that formats of the same type . . . are not close substitutes for one another."[10]

The Commission also recognized that the value of a format in a given market depends on aggregate intensity of preference for each form or sub-format. No measure of this factor exists.[11] Since the Commission could not discover any consistent way to measure differences in the intensity of audience preferences for various formats, it could not determine a net public interest gain or loss resulting from the replacement of one format by another.[12]

[7] *Supra* n.2 (FCC App. 60a).
[8] *Supra* n.3 (FCC App. 117a).
[9] 60 F.C.C.2d at 863-64 (FCC App. 129a-30a).
[10] *Id.* at 874-75 (FCC App. 162a-63a).
[11] *Id.* at 864 (FCC App. 130a).
[12] *Id.*

The Commission found that the marketplace was already providing great diversity of program service, and was responding to audience preferences for diversity within formats that often outweighed collective preferences among formats.[13] The Commission also found that marketplace determination of radio formats "has a precious element of flexibility which no system of regulatory supervision could possibly approximate."[14] Consequently, the Commission explicitly found that administrative regulation of formats under the *Atlanta* doctrine would be harmful to the public interest, not beneficial.[15]

The Commission also reviewed the Communications Act in light of decisions of this Court, particularly *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940):

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

Since radio broadcasters can compete only "in the domain of program formats," the Commission saw a legal necessity to leave format changes to market forces, rather than attempt to regulate them.[16] This Court's interpretation of Congress' intent supported the agency's own findings that the public interest was served by format competition among radio broadcasters.

On review, the court of appeals invalidated the Commission's policy of not interfering in radio licensees' format decisions. *WNCN Listeners Guild* v. *FCC*, 610 F.2d 838 (D.C. Cir. 1979) (*en banc*) (FCC. App. 1a). The court was unconvinced by the distinction between its case-by-case approach and the Commission's comprehensive reexamination of the subject:

[13] *Id.* at 863 (FCC App. 129a).
[14] *Id.* at 864 (FCC App. 131a).
[15] *Id.* (FCC App. 130a).
[16] *Id.* at 860 (FCC App. 122a-123a).

> We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals and as it is to be administered by the Commission. . . .
>
> *WEFM* was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act.[17]

The court believed the Commission drastically misinterpreted the format cases to require selection of all formats by regulation rather than by market forces. The court explained that administrative oversight of format changes was intended as a supplement to the market's influence on formats, not a substitute. Commission intervention in disputes over format changes was only necessary, according to the court, "when there is strong prima facie evidence that the market has in fact broken down."[18]

The court explained that the broadcast market responds inadequately to listener preferences because broadcast revenue comes from advertising. Consequently, broadcasters "serve young adults with large discretionary incomes in preference to demographically less desirable groups like children, the elderly, or the poor."[19] *WEFM* was cited to support this proposition, although *WEFM* contains no support for the proposition other than its bare statement. For example, *WEFM* refers to no empirical studies or other data about whether well-to-do young adults' musical tastes correspond—or do not correspond—to those of the elderly, the poor or any other groups.

The court also discussed the Commission's complaint that any format classification scheme was necessarily subjective, and that the distinctions drawn in previous cases were adminis-

[17] 610 F.2d at 854-55 (FCC App. 32a-33a) (citations omitted).
[18] *Id.* at 851 (FCC App. 24a).
[19] *Id.* at 851.

tratively infeasible. The court explained that it was forced to develop its own format classifications in each case because the Commission had not classified formats comprehensively through rule making. The court advised the Commission to produce "a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational."[20] The court suggested that this classification scheme could use broader categories as one way to ameliorate the difficulties of implementing *WEFM*.[21] It did not explain how broad categories could be squared with earlier cases requiring extremely narrow categories. For example, in *WEFM* the court considered the situation in Chicago where a dispute arose over whether a particular station was "classical." There the court noted that one station might play twentieth century classical music, and another might not. Both might be called "classical," but "the loss of either would unquestionably lessen diversity in the area."[22]

The court of appeals was sanguine about the efficacy of administrative format regulation, because most prior format disputes had been settled rather than fully litigated.[23] The court apparently did not recognize the likelihood that the expense and delay of litigation, which prompted the need for settlement, deterred licensees' freedom of choice in selecting program content and deprived listeners of the benefits of programming selected through the marketplace rather than by government fiat.[24]

The court gave little attention to arguments that Commission oversight of formats was contrary to the legislative history of the Communications Act,[25] that it violated the First Amend-

[20] *Id.* at 853 (FCC App. 29a) (citation omitted).
[21] *Id.* at 854 (FCC App. 30a).
[22] 506 F.2d at 264-65 n.28.
[23] 610 F.2d at 848-49, 851 (FCC App. 18a-20a, 25a).
[24] *See Policy Statement*, 60 F.C.C.2d at 864-65 (FCC App. 131a-133a).
[25] *See* 610 F.2d at 852 n.37 (FCC App. 26a-27a n.37).

ment as applied to broadcasting,[26] and that rejection of the *Policy Statement* exceeded the court's powers of review as explained in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*").

The court of appeals also criticized the Commission's rationality and impartiality in issuing the *Policy Statement*. The court was particularly aggravated by the Commission's reliance on a staff study[27] that the court felt had not been made available at a sufficiently early stage for adversarial comment.[28] The court was also unconvinced by the study's statistical analysis, finding the Commission's reasoning flawed.[29] The majority preferred its own "common sense" approach to formats. It acknowledged that people often preferred the announcing and tempo on one station to another with the same format. But it asserted that devotees of a particular format would, if forced to change stations, prefer to switch to a station with a similar format than one with an entirely different format.[30] Thus the court failed to take account of the staff study's major result: that intensity of audience preference, derived statistically from audience ratings, is approximately the same *within* various format categories as among them. The difference between two stations with "country & western" formats may be as palpable to the listening audience as the difference between two stations, one classified "talk" and the other "classical."[31] The "common sense" of it therefore is not an accurate description of audience preferences; but the court of appeals did not explain why its intuitive view should prevail over the expert agency's.

[26] *Id.* at 855 (FCC App. 33a).

[27] The staff study is Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872 (FCC App. 156a).

[28] 610 F.2d at 846-47, 855-56 (FCC App. 14a-17a, 34a-36a).

[29] *Id.* at 856-57 (FCC App. 37a).

[30] *Id.*

[31] *See* 60 F.C.C.2d at 874-75, 881 (FCC App. 162a-163a, 170a).

Judge Tamm, joined by Judge MacKinnon, dissented on the ground that the majority was substituting its policy preference on a judgmental or predictive matter for that of the Commission, in violation of *NCCB*.[32] Judge Tamm criticized the majority's "substitution" doctrine, which indicates that once the government determines that two stations have approximately the same format, either station can be presumed to satisfy the same audience preferences. Neither is deemed "unique." The government should only be concerned about preserving "unique" formats in the name of diversity. The result, Judge Tamm believed, would be government preservation of formats favored by very few listeners at the expense of many.[33] Judge Tamm also agreed with the Commission that "unique" formats could not adequately be distinguished from "non-unique" formats (a major point in the Commission's *Policy Statement*),[34] and that the Commission could not reliably measure audience preferences for different formats.[35] Judge Tamm declared:

> More important than the specifics of the current debate, is the lack of deference the majority accords the commission's assessment of market conditions .... [The majority] mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market .... The majority has simply substituted its views for the Commission's.[36]

In a separate opinion, Judge Bazelon concurred on the ground that the Commission had not made its staff study available for public comment sufficiently early in the rule making below.[37] However, he carefully noted his general

[32] 610 F.2d at 865 (FCC App. 56a).

[33] *Id.* at 862 (FCC App. 49a-50a).

[34] *Id.* at 862-63 (FCC App. 50a-51a).

[35] *Id.* at 863-64 (FCC App. 51a-53a).

[36] *Id.* at 864 (FCC App. 55a).

[37] *Id.* at 858 (FCC App. 41a).

agreement on the merits with Judge Tamm's dissent, and he criticized the majority for failing "to grapple seriously with the constitutional implications of its decision."[38]

SUMMARY OF ARGUMENT

I.

The court of appeals' invalidation of the Commission's legislatively-determined format policy violates longstanding guidelines about the relationship between court and agency summarized most recently in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). That case, like the present one, involved a disagreement between court and agency about the nature of "diversity" under the Communications Act of 1934. In both cases the Commission's reasoned findings were amply supported in the record. Therefore, in the present case the court of appeals should have sustained the Commission's judgment that market forces are the best means of achieving diversity in radio programming, while administrative format regulation is counterproductive.

The court of appeals did not delve into the Communications Act's legislative history on the subject of formats. However, statements of Senator Wallace H. White, who played a key role in the Act's creation, show that Congress considered and rejected the categorical regulation of radio broadcasting. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), also affirms the statutory intent that competition, not regulation, is to control radio programming. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), explains that the Commission cannot be required to entangle itself in content decisions in the cause of public "access" to the airwaves.

The court of appeals also deviated from this Court's guidelines in evaluating a study of radio formats which was part

[38] *Id.* at 859 (FCC App. 42a).

of the Commission's inquiry. The court improperly discounted the results, a defect which permeates its review of the case.

II.

First Amendment doctrines in areas other than broadcasting have an important bearing on the disposition of this case. "Less drastic means" analysis is especially helpful. Congress and the Commission have chosen a number of less intrusive methods to increase diversity on radio. The Commission has created a nationwide noncommercial FM radio service specifically to provide programming that may not be in great demand in the commercial marketplace. Congress has supported this plan by providing money and other assistance. The Commission also has "multiple ownership" rules encouraging diversity of ownership in a content-neutral fashion. And reliance on the marketplace to provide diversity and innovation is itself a less drastic alternative to format control.

By concentrating heavily on the desires of various listener groups in the radio audience, the court of appeals shifted too far from the First Amendment's traditional focus of preserving speakers' rights. The First Amendment requires freedom for willing speakers in order to preserve the public's right to a variety of ideas. Broadcasting's condition of scarcity requires government to allocate frequencies; but that does not affect the constitutional premise that government is disabled from choosing which speech best serves the public interest.

Even within the narrow confines of the fairness doctrine, editorial freedom merits great deference. Beyond those boundaries, the First Amendment's recognition of potential government abuse bars official decisions that restrict the speech of some in order to promote the interests of others. This Court should therefore remove any reservations about the application of traditional First Amendment concepts to broadcasting.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY NULLIFIED THE COMMISSION'S POLICY FOR ACHIEVING DIVERSITY IN RADIO BROADCASTING

The court of appeals' decision in *WNCN*, overturning the Commission's painstaking conclusions on radio formats, neglects to deal with an array of case law and legislative history bearing directly on the subject. Some of these points were not urged on the court in early format decisions such as *Atlanta* and *Progressive Rock*. When the arguments were raised in later cases, the court gave them little consideration. Nevertheless, they control the disposition of this case.

A. Under *NCCB*, Policy Decisions on Diversity in Radio Broadcasting are the Province of the Commission

The confines of judicial review of agency action are long familiar. *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Moreover, the narrow scope of judicial scrutiny in broadcasting cases has been reemphasized recently in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) ("*DNC*"), and in 1978 in *NCCB*. Yet the court of appeals, for reasons that are obscure, has ignored this Court's repeated instructions and, once again, substituted its own policy judgments for the Commission's.

NCCB reiterates the standard for review of the Commission's entertainment format *Policy Statement*. *NCCB* dealt with the Commission's rule making on newspaper-broadcast cross-ownership, an area, like the present case, where Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public interest.' "[39] The Commission rationally weighed competing policies, and promulgated rules designed to encourage diversity of broadcast and newspaper ownership to the extent that such a goal did not impair " 'the

[39] 436 U.S. at 795.

best practicable [broadcast] service to the American public.' "[40] The court of appeals overturned portions of the cross-ownership rules, substituting its judgment for the Commission's on the importance of diversity of media ownership, and the consequences that would result from a stringent policy of requiring divestitute of cross-owned broadcast and newspaper properties. This Court forcefully disagreed, holding that Congress committed "the weighing of policies under the 'public interest' standard" to the Commission, which was entitled to give greater force to the criterion of "best practicable service" than to diversity of ownership.[41] The Commission was empowered to treat diversity as a subordinate factor even though the factual record was inadequate to demonstrate the precise degree of harm to broadcast service that would be caused by not requiring across-the-board divestiture.[42]

In reinstating the Commission's policy in its entirety, this Court looked to whether the Commission had been arbitrary or capricious in failing to proceed rationally or in not considering the relevant factors, citing *Citizens to Preserve Overton Park* v. *Volpe*.[43] Judicial review, while it must be "searching and careful," does not empower a court " 'to substitute its judgment for that of the agency.' "[44] Mr. Justice Marshall explained:

> We cannot say that the Commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increasing diversification of ownership.[45]

The *NCCB* decision provides a striking parallel to the case at bar. After developing a full record, the Commission found facts and made a "legislative-type" judgment[46] that leaving

[40] *Id.* at 803-04.
[41] *Id.* at 810-11.
[42] *Id.* at 813-14.
[43] 401 U.S. 402, 413-16 (1971).
[44] *NCCB*, 436 U.S. at 802-03.
[45] *Id.* at 805.
[46] *See* 436 U.S. at 814.

format decisions to broadcasters, subject to market forces, is the most effective means of achieving an acceptable level of program "diversity" under the public interest standard. The Commission reached its conclusions through a rational process—even though others might assay the facts differently—and thoroughly explained the basis for its conclusions. The difference between this kind of factual determination and adjudication is discussed in *NCCB*, in connection with policies governing local cross-ownership of newspapers and broadcast stations:

> [T]o the extent that factual determinations were involved in the Commission's decision . . . they were primarily of a judgmental or predictive nature. . . . In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'[47]

The court of appeals divined that the Commission can "discover" the radio audience's tastes and, using that information, weigh the detriment to the public from losing an allegedly unique format. This assessment is presumed suited to the adjudicative hearing process.[48] The court also held that the Act's provision encouraging "the larger and more effective use of radio"[49] makes "axiomatic" the preservation of formats that are preferred by a significant number of listeners. However, the court of appeals adopted this approach without benefit of any comprehensive, legislative-like agency policy.

[47] *Id.* at 813-14 (citations omitted). *See* K. Davis, *Administrative Law of the Seventies*, §5.01 *et seq.* (1976), for a discussion of the distinction between administrative promulgation of legislative rules and adjudication.

[48] *WEFM*, 506 F.2d at 260-61.

[49] *See* 47 U.S.C. §303(g).

In *WNCN*, the court of appeals sought to preserve its format doctrine as law, not policy;[50] but as Judge Tamm aptly observed: "Of course, it is both."[51] Now that the Commission has thoroughly restudied this area, its legislative judgment is entitled to controlling weight under *NCCB*.

A similar parallel regarding the standard and the scope of review is found in *DNC*. The Commission had ruled that the public interest standard of the Communications Act did not mandate a right of access by non-licensees for editorial advertisements dealing with public issues. The court of appeals rejected the Commission's conclusions about implementing the basic policy of the Communications Act and the First Amendment. It held that, under the First Amendment, the Commission was required to develop a method for implementing an "abridgeable" right to present editorial advertisements.[52] This court disagreed, holding:

> that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission's judgment on these matters.[53]

Deference to the Commission's legislative fact-finding and inferential reasoning is long-standing. For example, in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the Commission's Chain Broadcasting Regulations were attacked as arbitrary and capricious. This Court declared:

[50] 610 F.2d at 854 (FCC App. 32a).

[51] *Id.* at 865 n.19 (FCC App. 56a n.19).

[52] 412 U.S. at 100.

[53] *Id.* at 122-23.

> If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. . . . 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the . . . Regulations.[54]

The Commission carefully delineated both the grounds of decision and essential facts upon which the inferences in the *Policy Statement* are based. Since the Commission's decision was not so irrational as to be arbitrary and capricious, its format policy must be sustained.[55]

B. The Commission's Implementation of Diversity is Consistent With Legislative History and With Precedent

The legislative history of the Radio Act of 1927 and the Communications Act of 1934 conclusively demonstrates that

[54] *Id.* at 224.

[55] *See Dunlop* v. *Bachowski*, 421 U.S. 560, 572-74 (1975), discussing the standard and scope of review of the Secretary of Labor's decisions under Section 401 of the Labor-Management Reporting and Disclosure Act of 1959. In *Dunlop* the Secretary of Labor had been delegated exclusive enforcement authority to police union elections, *id.* at 568-69, much as the Commission has been delegated authority to implement the Communications Act's public interest standard. This Court held that, while the reviewing court was not authorized to substitute its own judgment for that of the Secretary, the Secretary was required to provide a statement of reasons supporting his determination. A careful delineation of the basis for discretionary action would enable an intelligent review of the administrative determination. *Id.* at 571.

Congress did not intend the Commission to engage in format regulation. Senator Wallace H. White was the draftsman of the 1927 Act. His statements in *Hearings on S. 2910 Before the Senate Interstate Commerce Committee*, 73d Cong., 2d Sess. 190-91 (1934), and earlier while a member of the House of Representatives, *Hearings on H.R. 5589 Before the House Committee on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 39-40 (1926), show that the Communications Act includes a "very clear purpose to give no prior rights or preferential recognition to any group or to any [character of] service." *Hearings on S. 2910, supra* at 191. Senator White's comments cover what are today, in essence, radio formats.

This legislative history fortifies the statutory interpretation in *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474-75 (1940):

> [T]he Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition . . . .
>
> An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.
>
> But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy . . . .
>
> . . . .
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.[56]

Reliance on marketplace competition to create diverse radio service is the centerpiece of the Commission's format policy.[57]

WNCN's contrary command ignores more than legislative history. It fails to heed the delicate First Amendment balance struck by *DNC* and *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969).

Red Lion declared a paramount right of viewers and listeners to receive "suitable access to social, political, esthetic, moral and other ideas and experiences," a right neither Congress nor the FCC could abridge.[58] *Red Lion's* treatment of the fairness doctrine and personal attack rules was based on the "long series of FCC rulings" in fairness doctrine cases,[59] though

[56] *WEFM* dismisses the language in *Sanders* by referring to *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), and *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). 506 F.2d at 267. *RCA* is a common carrier case of doubtful relevance to broadcasting. It applies here only in that it stands for the proposition that the Commission can, upon making an adequate explanation, adopt policies favoring competition in the marketplace.

Nor does *NBC* support FCC supervision of formats. The Chain Broadcasting Regulations there were directed at contractual relationships between networks and affiliates. The regulations did not directly or indirectly prevent a station from broadcasting specified content, nor force a station into particular programming. Rather, they prevented networks from using economic power to coerce stations into certain exclusive carriage relationships. They were aimed at overall economic structuring of the broadcast industry, not at the subject matter broadcast by the networks or stations. *NBC* offers no support for regulation of broadcast material.

[57] *Policy Statement*, 60 F.C.C.2d at 861 (FCC App. 124a).

[58] 395 U.S. at 390.

[59] *Id.* at 380-82.

this Court specifically did not approve all past or future fairness doctrine decisions.[60] This Court also relied on congressional approval of the fairness doctrine in the legislative history of Section 315(a), 47 U.S.C. §315(a).[61] *Red Lion* thus proceeded from a legislative intent to regulate absent in *WEFM*.

The fairness doctrine issue before the Court was limited to " 'the obligation of presenting important public questions fairly and without bias.' "[62] *Red Lion* therefore is not a broad mandate that applies with equal force to the range of a broadcaster's program discretion, including format selection. Indeed, other questions of Commission oversight of program content "would raise more serious First Amendment issues."[63]

This caution presaged *DNC*, where Mr. Justice White's concurring opinion underscored Congress' intention "that broadcasters have wide discretion with respect to the method of compliance [with the fairness doctrine]."[64] Mr. Justice Stewart emphasized that broadcasters retained rights under the First Amendment, even though *Red Lion* indicated that the rights were "abridgeable."[65] And, in striking down a "right of access"

[60] *Id.* at 396. *Cf. FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("... Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.").

[61] 395 U.S. at 380-83.

[62] *Id.* at 383 (citation omitted). The Court was concentrating solely on the threshold fairness doctrine obligations to present controversial issues in a balanced fashion, particularly those aspects of the fairness doctrine found in the personal attack rules and the Commission's decision granting a right of reply to Fred J. Cooke to a broadcast by the Reverend Billy James Hargis.

[63] *Id.* at 396.

[64] 412 U.S. at 147.

[65] *Id.* at 136-38. *See also* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1146 (1974), interpreting Justice Stewart's remarks as suggesting that the fairness doctrine "tested the outer limits of the first amendment's toleration of content control."

to broadcast time for controversial issues, the majority opinion highlighted the decisional significance of "the risk of an enlargement of government control over the content of broadcast discussion of public issues" inherent in a right of access.[66]

Under *Red Lion* and *DNC*, broadcasters' First Amendment rights must give way only in narrowly defined situations under the fairness doctrine and personal attack rules. Beyond these confines, the First Amendment protects licensees' editorial discretion. *DNC's* interpretation of *Red Lion* leaves no room for format regulation and its attendant chilling burdens. "Assuring" access to the airwaves for all major aspects of contemporary culture, like editorial access, would require detailed bureaucratic second-guessing of program decisions.

The court of appeals attempts in *WNCN* to minimize problems inherent in administrative classification of music, discussion, sports and other radio fare.[67] Format disputes require the Commission to judge the closeness of programming alternatives, the relative social value of various formats, and the importance of each to different segments of the public. The Commission's staff study, appended to the *Policy Statement*, notes:

> [G]iven the difficulties in defining a meaningful format classification coupled with a total lack of information on the relative values associated with different types of programs, we are convinced that Commission decisions in this matter will automatically lack a rational underpinning. In short, they will simply reflect the subjective and necessarily arbitrary opinions of administrative law judges.[68]

The court in *WNCN* expects any format classification scheme ultimately adopted to be "imprecise at the margins."[69] But this

[66] 412 U.S. at 126.
[67] 610 F.2d at 852-54 (FCC App. 27a-32a).
[68] 60 F.C.C.2d at 875 (FCC App. 163a-164a).
[69] 610 F.2d at 853 (FCC App. 29a).

area is mostly margin. The distinctions in earlier format cases between "progressive rock" and "top forty" rock, "classical" and "fine arts," or twentieth-century and non-twentieth century classical music, prove the point. This Court has time and again cautioned against any government regulation of expression that operates without standards sufficiently clear to prevent administrative abuse. The police commissioner whose discretionary action was invalidated in *Kunz* v. *New York*, 340 U.S. 290 (1951), arguably relied on statutory criteria at least as objective as the distinctions that control format cases. The ordinance that lacked sufficient specificity to guide police issuance of solicitation permits in *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976), is hardly less subjective in its own realm than format labels. Surely the Commission was reasonable to dispair of defining radio formats with the specificity necessary to pass muster.[70] The court of appeals' assurances of only "limited and deferential" review of format guidelines[71] are little comfort in light of this Court's unambiguous standards.

The court of appeals offers no clue to any characteristics of the Commission's hearing process that would ameliorate the pervasive vagueness of format inquiries. The issues in format cases involve evaluation of benefit or detriment as to matters of taste. They are unresolvable in a hearing because taste is unquantifiable by administrative or judicial fiat. The agency's lack of faith in the hearing process[72] is decisive.[73]

[70] *See* 60 F.C.C.2d at 862 (FCC App. 126a-127a).
[71] 610 F.2d at 852-53 (FCC App. 28a).
[72] 60 F.C.C.2d at 865 (FCC App. 132a).
[73] While the Commission knows best the limits of its processes, the lack of concrete guidelines in FCC hearings is a problem of long duration. *See, e.g.*, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1071 (1962).

The absence of clear decisional criteria has contributed to FCC hearings that, including appeals and remands, have lasted over

(*footnote continues*)

C. The Commission's Staff Study was Given Insufficient Weight by the Court of Appeals

The majority opinion in *WNCN* criticizes the Commission's staff study[74] on procedural grounds[75] and disagrees with the

(*footnote continued*)

decades. *See, e.g., Lamar Life Broadcasting Co.*, 46 Rad. Reg.2d (P&F) 1054 (1979), the latest chapter in a "long and tortuous" controversy that began in 1955, *id.* at 1055; *Mid-Florida Television Corporation*, 70 F.C.C.2d 281 (1978), a comparative proceeding for authority to operate a television station that has dragged on since 1957 and has yet to be concluded; *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046 (D.C. Cir. 1977), a radio comparative hearing dating from 1962, about which the court observed:

> The ensuing proceeding generated no fewer than eight opinions during its twelve-year administrative lifespan. The hearing examiner, the Review Board and the Commission each favored a different applicant, and for different reasons. Although each struggled valiantly with the bevy of complex issues presented, the net result was error, and so we reverse.

Id. at 1047 (citations omitted). While these cases are egregious, they are by no means anomalous.

The Commission's criteria for evaluating incumbent licensees against new competing applicants have failed to satisfy judicial scrutiny as announced, *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), and as applied, *Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37 (D.C. Cir. 1978). This experience creates grave doubt that Commission hearings can make the delicate discriminations among artistic qualities that are essential in radio format disputes.

Suppose that the owner of the only classical station in a market wanted to switch to an all news format. Free speech and press are obviously at stake. Could an administrative law judge decide that classical music was more in the public interest than news? Might the decision depend on whether there was already an "all news" station in the market? Suppose the existing all news station had a "liberal" editorial outlook. Could a hearing inquire into the subject? Would the case turn on whether the licensee who wanted to change formats would promise a conservative editorial policy to promote "diversity"?

[74] *Policy Statement*, 60 F.C.C.2d at 872 (FCC App. 156a).

[75] *WNCN*, 610 F.2d at 846-47 (FCC App. 14a-17a).

study's ultimate conclusions.[76] The court's criticisms, however, violate this Court's instructions in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978), that reviewing courts should give administrative agencies significant discretion in conducting rule makings. The court of appeals' refusal to grant the requisite discretion to the Commission is an independent basis on which *WNCN* must be overturned.

The gist of the court of appeals' complaint was that the Commission did not release the staff study until it issued the *Policy Statement*. The staff study was, of course, available for adversarial comment on reconsideration,[77] and the Commission's reconsideration order dealt specifically with objections to the study.[78] While the court of appeals declined to invalidate the *Policy Statement* on procedural grounds relating to the study,[79] "there is little doubt . . . that the ineluctable mandate of the court's decision is that the procedures afforded during the [rule making were] inadequate."[80]

The court of appeals' procedural criticisms are meritless. The court implies that the Commission had an obligation to release the staff study "for adversarial testing of its data base, methodology, and conclusions" prior to issuing the *Policy Statement*.[81] But the cases cited by the court do not support this conclusion. *Portland Cement Association* v. *Ruckelshaus*[82] and

[76] *Id.* at 856-57 (FCC App. 36a-37a).

[77] *See* 47 CFR §1.429.

[78] *Changes in the Entertainment Formats of Broadcast Stations*, 66 F.C.C.2d 78, 84-85 (1977) (FCC App. 176a, 189a-192a).

[79] *WNCN*, 610 F.2d at 847 n.24 (FCC App. 17a n.24).

[80] 435 U.S. at 541-42.

[81] 610 F.2d at 846 (FCC App. 14a-15a).

[82] 486 F.2d 375 (D.C. Cir. 1973), *cert. denied sub. nom. Portland Cement Corp.* v. *Adm'r., EPA*, 417 U.S. 921 (1974), *appeal after remand*, 513 F.2d 506 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975).

International Harvester Company v. *Ruckelshaus*[83] require that the rule making record, compiled during the initial proceeding or upon reconsideration, be an adequate basis for the agency's ultimate decision. The voluminous comments submitted to the Commission, together with the Commission's extensive analysis and the staff study, present this firm foundation.

More significant, however, is the court of appeals' departure from the guidelines for scope of review set forth in *Vermont Yankee*, which explains that a court cannot require an agency to add procedural guarantees going beyond the requirements of the Administrative Procedure Act.[84] For example, in *Vermont Yankee* the court of appeals held that a report prepared by the Advisory Committee on Reactor Safeguards (ACRS) should have been returned to ACRS so that it could be put in terms understandable to laymen. This is closely analogous to the court's complaint in *WNCN* that the computer analysis in the staff study was not easily understood, and that the Commission should have provided information "about the study's design and data base sufficient to allow meaningful comment."[85]

Vermont Yankee explains that nothing supports requiring an explanation, understandable to laymen, for each item in a decision. As in *Vermont Yankee*, the agency here was not obfuscating its findings, and the study was based on "matters of public record, on file in the Commission's public-documents room."[86] The underlying data were public and the method of analysis was comprehensible to a qualified statistician. Any interested party easily could have consulted such a person.

Various parties obviously found the conclusions in the staff study unpalatable. But the burden was upon those urging reconsideration of the *Policy Statement* to identify mistakes in

[83] 478 F.2d 615 (D.C. Cir. 1973).
[84] 435 U.S. at 545-48.
[85] *WNCN*, 610 F.2d at 847 (FCC App. 17a).
[86] 435 U.S. at 556.

the staff study and show their significance. Otherwise the proceedings become "a game or a forum to engage in unjustified obstructionism."[87] Unfortunately, the commenting parties seemed satisfied to complain that the Commission did not undertake an independent study of format diversity[88] and, even after additional information was put in the public file, that they could not understand the staff study.[89] The weight given by the court of appeals to these complaints demonstrates that the Commission's decision-making process was not reviewed according to the standards of *Vermont Yankee*.

II. THE FIRST AMENDMENT PROHIBITS GOVERNMENT SPECIFICATION OF RADIO FORMATS

Beyond *DNC* and *Red Lion*, constitutional doctrine of enduring vitality can and should be applied to help resolve vexing First Amendment issues in broadcast regulation. Without this additional clarification, the Commission and reviewing courts likely will continue at odds over basic directions in regulatory policy.

A. This Court's Doctrine of "Less Drastic Means" Strongly Supports the Commission's Format Policy

This Court's doctrine of "less drastic means" limits government's power to impinge upon free speech activities:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

[87] *Id.* at 553.
[88] 610 F.2d at 846-47 (FCC App. 15a).
[89] *Id.* at 847 (FCC App. 16a-17a).

Shelton v. *Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted).[90]

In *United States* v. *Robel*, 389 U.S. 258 (1967), this Court held unconstitutional a section of the Subversive Activities Control Act prohibiting members of a Communist-action organization from being employed in any defense facility. Though the Act was founded on Congress' broad war power to prevent internal subversion of national defense plants, this Court declared:

> When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated . . . . The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cut deeply into the right of association . . . . The inhibiting effect on the exercise of First Amendment rights is clear.
>
> . . . .
>
> [W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms.[91]

"Less drastic means" analysis is necessary in the broadcast format area if regulatory policy is to be harmonized with First Amendment doctrine generally. Otherwise, extrapolation of "public interest" values will inevitably erode rights of free

[90] *See also United States* v. *Paramount Pictures*, 334 U.S. 131, 166 (1948).

[91] 389 U.S. at 264-68 (footnotes and citations omitted); *see Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

expression as the Commission and courts pursue aims which may each, in isolation, appear desirable.

WEFM held that the Commission unjustifiably relied on competition among broadcasters to produce formats that would serve the public interest, calling this "inherently inconsistent with 'secur[ing] the maximum benefits of radio to all the people of the United States,'" and inconsistent with the public interest standard.[92] The court of appeals gave little weight to the inevitable problems of developing standards for FCC analysis of formats—especially in the area of unconstitutional vagueness—nor did it factor the First Amendment rights of broadcasters into the equation.

Contrast, for example, the approach in *WEFM* and this Court's analysis in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upholding parts of the Federal Election Campaign Act amendments of 1974 and declaring others unconstitutional. In *Buckley* this Court explained the process for determining whether each part of the Federal Election Campaign Act was unconstitutional:

> The markedly greater burden on basic freedoms caused by [the statute] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of [the statute] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to the limitations on core First Amendment rights of political expression.[93]

The *Buckley* analysis is a two-step process. First, the governmental interest is scrutinized to determine whether it is legitimate and, if so, to assess its importance. Second, the government's chosen means are weighed against impairment of First Amendment rights, in light of alternative means of promoting

[92] 506 F.2d at 268.

[93] 424 U.S. at 44-45.

the governmental interest with a less adverse impact on free expression.[94]

The goal of "diversity" in media cannot be gainsaid in the abstract. But the constitutional legitimacy of the court of appeals' format doctrine is open to serious question. *WEFM* and *WNCN* in essence require the Commission ultimately to consider substituting its programming judgment for that of licensees. As Commissioner Robinson noted, ". . . the obligation to carry one format necessarily entails the obligation to refrain from presenting another."[95] Official involvement of this kind is offensive to the First Amendment:

> We know from experience that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.'

Bigelow v. *Virginia*, 421 U.S. 809, 829 (1975), *quoting* 2 Z. Chafee, *Government and Mass Communications* 633 (1947). And Mr. Justice Powell observed for the Court in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 (1978) that:

> [i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972).

This view applies with the same force to selection of artistic and cultural programming as it does to informational programming;[96] broadcasting's condition of scarcity does not alter the result. In the words of Mr. Justice Stewart, concurring in *DNC*, 412 U.S. 94, 146 (1973):

> And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment 'values' alone, I could not agree with the Court of Appeals. For if those 'values' mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

Since there is serious doubt about the legitimacy of government format scrutiny, the search for alternative approaches is especially important. Other means are readily available. Market competition is itself the most significant "less drastic means" of achieving program diversity. Another "less drastic means" is the Commission's regulation of broadcast facilities to enhance competition. The "multiple ownership rules"[97] approved in *NCCB* seek to guide industry structure rather than the content of licensee expression. They are content neutral—precisely the opposite of the scheme in *WNCN*.

The FCC's creation of noncommercial educational radio and television services is an extremely important means to promote diversity. Public broadcasting is intended specifically to respond to market forces other than those which influence the program decisions of commercial broadcasters. Noncom-

[94] While *Buckley* also recognized that "the broadcast media pose unique and special problems not present in the traditional free speech case," *id.* at 50 n.55, traditional First Amendment analysis still must play a controlling role in broadcast regulation. *See* Part IIB, *infra*. In *NCCB* this Court distinguished between regulations directed at the structure of the broadcast industry—similar in form to antitrust prohibitions—and regulations that might be based on the content of broadcasts. Regulation of industry structure could be approved, while regulation whose operation "was based solely on the content of constitutionally protected speech" would fail, 436 U.S. 800-01, *citing Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Elrod* v. *Burns*, 427 U.S. 347 (1976). The discussion referred to *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), noting that a completely different issue would have been posed "if 'the Commission [were] to choose among applicants upon the basis of their political, economic or social views.' 319 U.S. at 226." *Id.*

[95] *Notice of Inquiry*, 57 F.C.C.2d at 600.

[96] *See United States* v. *Paramount Pictures*, 334 U.S. 131 (1948); *Winters* v. *New York*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

[97] *See* 47 CFR §§73.35, 73.240, 73.636 (1976).

mercial educational services present programming which infrequently appears on commercial radio or television;[98] and as of March 31, 1980, there were 1,035 FM educational radio stations serving large and small markets across the country.[99] Congress ratified this method of program diversity in the various public broadcasting statutes enacted since 1962.[100] The legislative intent that diversity be an important element of public broadcasting is clear from Section 396 of the Communications Act.[101] These elements, taken together, constitute far less drastic means of achieving diversity in radio programs than the format scrutiny approved in *WEFM*.

Any implementation of Section 309's public interest standard which affects First Amendment rights must intrude as little as possible upon protected licensee expression. To vindicate *WNCN's* requirement for Commission involvement, it must be shown that the otherwise uninhibited "marketplace of ideas" would be severely constricted absent detailed FCC program scrutiny. The burden is on those seeking format regulation, and

[98] For an overview of the contributions of noncommercial educational ("public") radio to broadcasting diversity, *see generally A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 185 *et seq.* (1979).

[99] *Broadcast Station Totals for March 1980,* FCC Public Notice 30447 (April 9, 1980).

[100] *See* Educational Television Facilities Act of 1962, Pub.L.No. 87-447, 76 Stat. 64, *as amended by* Public Broadcasting Act of 1967, Pub.L.No. 90-129, 81 Stat. 365, 367, *and by* Educational Broadcasting Facilities and Telecommunications Demonstration Act of 1976, Pub.L.No. 94-309, 90 Stat. 683 (*codified at* 47 U.S.C. §390, *et seq.*). *See also* Sections 396(a)(1), (3), (5) and (g)(1)(A) of the Communications Act, 47 U.S.C. §396(a)(1), (3) (5), (g)(1)(A).

[101] Congress was straightforward in its finding:

> that it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and *which will constitute an expression of diversity and excellence* .... 47 U.S.C. §396(a)(5) (1978) (emphasis supplied).

such a showing is impossible. There are "less drastic means" already available for program diversity: the commercial marketplace, as structured under the "multiple ownership" rules, and noncommercial educational radio and television, which respond to programming demands outside the commercial marketplace.

B. The Rights of Broadcasters and Their Audience Are Defeated if Government Can Insist Upon Particular Expression in the Name of the Public Interest

In *WNCN* the court of appeals brushed aside constitutional objections to the format doctrine as it has developed since *Atlanta.*[102] We have already shown that this was error, for the *DNC* case is a bar to the kind of content scrutiny contemplated below. Even so, the court of appeals' encouragement of such intrusive regulation—and its unwillingness to probe the free speech implications of its decisions—raises a fundamental question: to what extent have the governing doctrines of broadcast regulation undermined essential First Amendment protection for broadcast licensees?

Red Lion declared that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[103] Was this a total shift in the First Amendment's traditional focus, so that the rights of broadcast programmers and editors are significantly devalued? Professor Benno Schmidt states the problem:

> [I]t is hard to see how the chilling effect challenge to the personal attack rules can be dismissed after *Miami Herald.* The assumption of the Commission and of the Court in *Red Lion,* that such reply rights enhance diversity of expression, has been reversed. If the

[102] "Suffice it to say that we found no constitutional impediment to the [*WEFM*] decision as we understood it." 610 F.2d at 855 (FCC App. 33a).

[103] 395 U.S. at 390.

personal attack rules are viewed as inhibiting expression, then they run counter to the instrumental policy of encouraging diversity of expression that *Red Lion* held to be the essence of the First Amendment as applied to broadcasting.

If such contingent access rights continue to be sustained for broadcasting, despite the chilling effect assumption of *Miami Herald*, it can only be on the theory that inhibitions of expression of the kind that the First Amendment bars for print media are permissible for radio and television. Such a theory would invite a new First Amendment approach to the electronic media. Diversity of expression for listeners and viewers (the First Amendment's dominant goal in broadcasting according to *Red Lion*) could not be the basis for continued approval. Rather, rights of reply in broadcasting would have to rest on the notion that regulation of the content of expression, including inhibition of certain types of expression, is permitted for broadcasting though it is not for print media.[104]

In all First Amendment areas besides broadcasting, precedent holds that the right of the public to suitable ideas depends on the right of speakers freely to assert their views. Though scarcity restricts the number of speakers who can use the broadcast media, grave danger still exists if government can abridge the speech rights of those fortunate enough to hold broadcast licenses. Any governmentally administered system would, if carried but a short distance, authorize imposition of bureaucratic ideas of what is best for the broadcast audience.

Prior to *Red Lion*, censorship was defined as an abuse by government, and could not by definition apply to decisions by editors, print or broadcast. *Near* v. *Minnesota*, 283 U.S. 697

[104] B. Schmidt, *Freedom of the Press vs. Public Access* 244-45 (1976), *citing Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

(1931); *see Mills* v. *Alabama*, 384 U.S. 214 (1966). The virtue of basing First Amendment analysis on speakers' rights was to remove government totally from selecting content. Free interchange of ideas was assured precisely because government was not allowed to determine which ones served the public interest, convenience and necessity.

Once government is charged with protecting listeners' rights to particular content, even in a condition of scarcity, the potential for abuse arises immediately. Any governmental attempt to promote one category of speech over another is a classic example of the evil at which the First Amendment is directed. Of necessity, the government's role should therefore be limited to preserving some use of the public airwaves for dealing with controversial public issues. *See Hague* v. *CIO*, 307 U.S. 496, 515-16 (1939). Once this is assured, further government involvement diminishes free expression instead of increasing it. The fairness doctrine consequently need not, and does not, apply to all speech protected by the First Amendment, but only to important public controversies. *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1105-06 (D.C. Cir. 1977).[105] Similarly, there is no need for the government to indulge in analysis of listeners' desires in order to perform the basic task of ensuring that the airwaves are devoted in part to balanced discussion of public issues. First Amendment theory still holds that the audience's long-range interest in robust expression is best served by allowing licensees the greatest possible freedom in program selection. The rights of listeners thus are protected, but not because the government is enabled to correct licensee mistakes in selecting program content.

[105] This provides another answer (besides "less drastic means") to Judge McGowan's question in *WEFM* as to "[p]recisely why the [regulatory] balance should be struck with entertainment programming in one pan and everything else in the other . . . ." 506 F.2d at 267. To fulfill the allocation function demanded in *Hague*, the government need only assure that use of the public airwaves includes some time devoted to the roughly balanced consideration of public issues. This can be done by concentrating solely on informational programming (news and public affairs).

The difficulty of centering First Amendment analysis on listeners' rights is well illustrated in non-broadcast cases. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court relied on the interest of society at large in having commercial information freely available for informed decisions. *Id.* at 769-70. But the analysis did not rest solely on the right of citizens to receive commercial speech:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. . . . [In a recent case], we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.' And in *Procunier* v. *Martinez*. . . where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. *See e.g.*, *Red Lion Broadcasting* v. *FCC*. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising. . . .

425 U.S. at 757-58 (citation and footnote omitted). There is a futility to assessing First Amendment rights by primary reference to "a right to receive." The freedom of willing speakers is essential, and this symmetry applies throughout all modes of expression, including broadcasting.

Procunier v. *Martinez*, 416 U.S. 396 (1974), cited in *Virginia State Board*, highlights the dilemma. *Procunier* invalidated certain California prisoner mail censorship regulations:

> [T]he assumption [is] that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. . . . [W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.[106]

However, "less drastic means" analysis of prisoners' rights was used to criticize prison officials and employees,[107] drawing analogies to cases such as *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), protecting speakers' First Amendment rights.[108] Further, in setting minimal procedural safeguards for review of inmate correspondence, this Court referred to "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment. . . ."[109] The Court also approved a procedure mandated by a lower court for notifying an inmate of the reasons for rejecting a letter by or addressed to him.[110] The focus on the rights of the inmates' correspondents did not exclude taking into account the rights of the prisoner-authors.

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978), addresses the notion that the influence of a group of speakers (specifically, corporations) might be a ground for special limitations on the right to free speech. This Court said:

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[106] 416 U.S. at 408.
[107] *Id.* at 415.
[108] *Id.* at 409-10.
[109] *Id.* at 418.
[110] *Id.* at 418-19.

> We noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'[111]

At the same time, in a footnote, the applicability of this basic tenet was reserved as to broadcasting.[112] The court of appeals has now shown the need to remove the reservation. It declared in *WNCN*:

> Our legal judgments in earlier cases. . . were grounded in certain factual premises, namely, that there is, in the traditional sense, no free market in radio broadcasting and that, in certain circumstances, when there are persuasive indications that market allocation has broken down, the Commission has been given a useful role by Congress to play in ensuring that the benefits of radio accrue to all the people, not simply those favored by advertisers.[113]

Government cannot ensure that the marketplace of ideas will cater to the tastes of every, or any, particular minority. For every minority group that is served, other minorities—defined by race, religion, political or cultural disposition—can claim they are being underserved. In the *Policy Statement*, the Commission legislatively determined that it lacked the capacity to structure broadcast formats so that all segments of the audience would be served, and that such efforts would compromise First Amendment restraints. As this Court said in *DNC*: "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result."[114]

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[111] 435 U.S. at 790-91, *quoting Buckley* v. *Valeo*, 424 U.S. at 48-49.

[112] *Id.* n.30.

[113] 610 F.2d at 855 (FCC App. 34a).

[114] 412 U.S. at 127 (footnote omitted).

Most broadcasters design their programming to attract the maximum audience, taking account of the market structure existing as a result of competitors' formats. Certainly these efforts are made in part to secure greater advertising revenue. But maximizing audience also maximizes the impact of a broadcaster's editorials, news and public affairs, as well as drama or other entertainment. It increases the public's exposure to ideas expressed in music, or humor, including the licensee's own expression and that of writers or artists whose views the licensee seeks to give wide exposure. As a conduit for others' expression, the licensee is no less entitled to protection under the First Amendment than a newspaper owner who publishes the work of popular columnists whose articles increase circulation. *See generally Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

Indeed, the selection of a format is itself a form of expression. The individual music, news, and talk programs may be the expressions of others, but the blending of elements into the whole which particularizes a station represents the expression of the licensee. Just as the parts have aesthetic value or convey ideas, so the whole is an artistic and intellectual statement. It is a form of expression protected by the First Amendment just as surely as an anthology is the expression of the editor as well as of the individual artists whose works are collected, or as the selection of news stories for publication constitutes an expression by the publisher of a newspaper. The fact that each hopes to appeal to an audience for commercial reasons does not attentuate that protection. *See Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Freedom of expression cannot exist if the government is allowed to sift through these motives, making judgments on ideas and aesthetics, simply because some degree of commercialism prompted their publication.

The most significant price for government format regulation would be paid by members of the public who desire programs other than those preferred by government officials.

CONCLUSION

The judgment of the court of appeals should be reversed and the Commission's *Policy Statement* reinstated.

Respectfully submitted,

B. DWIGHT PERRY
RICHARD D. MARKS
TODD D. GRAY
DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 862-8064

Counsel for Insilco Broadcasting Corporation, et al.

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APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sections 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a) and (e), provide:

> "(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> (e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the

Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission "

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), provides:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. §326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Sections 396(a)(1), (3) and (5), and (g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §396(a)(1), (3) and (5), and (g)(1)(A), provide:

"(a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. . . .

(g)(1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . ."